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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MASIMO CORPORATION

Plaintiff,

v.

POLITAN CAPITAL  
MANAGEMENT LP, POLITAN  
CAPITAL MANAGEMENT GP LLC,  
POLITAN CAPITAL PARTNERS GP  
LLC, POLITAN CAPITAL NY LLC,  
POLITAN INTERMEDIATE LTD.,  
POLITAN CAPITAL PARTNERS  
MASTER FUND LP, POLITAN  
CAPITAL PARTNERS LP, POLITAN  
CAPITAL OFFSHORE PARTNERS  
LP, QUENTIN KOFFEY, MICHELLE  
BRENNAN, MATTHEW HALL,  
AARON KAPITO,

Defendants.

Civil Action No. 8:24-cv-01568-JVS-JDE

**PLAINTIFF'S SUPPLEMENTAL  
SUBMISSION REGARDING  
ECONOMIC LOSS**

Hearing Date: September 9, 2024  
Time: 1:30 PM  
Courtroom: 10C  
Honorable James V. Selna

1 Plaintiff Masimo Corporation (“Masimo” or “the Company”) submits this  
2 supplemental brief regarding the Ninth Circuit’s holding in *N.Y.C. Employees’*  
3 *Retirement System v. Jobs*, 593 F.3d 1018 (9th Cir. 2010), finding that equitable  
4 relief cannot be granted under Section 14(a) of the Securities Exchange Act of 1934  
5 “without an allegation of economic loss.” Dkt. No. 136 at 2.

## 6 I. INTRODUCTION

7 Politan’s misinformation campaign has already caused, and will continue to  
8 cause, Masimo to suffer economic harm. Plaintiff’s Amended Complaint (Dkt. No.  
9 132 (the “Complaint” or “AC”)) and the evidence developed to date easily satisfy  
10 the standards for economic loss under Section 14(a) and *N.Y.C. Employees’*,  
11 sufficiently alleging that Politan and its predatory founder and activist investor,  
12 Quentin Koffey, forced Masimo to dedicate significant resources to correcting  
13 Politan’s lies and deceit.

## 14 II. LEGAL STANDARD

15 Loss causation “is simply ‘a causal connection between the material  
16 misrepresentation and the loss.’” *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F.  
17 Supp. 2d 1132, 1200 (C.D. Cal. 2008) (“loss causation generally ‘[s]hould not prove  
18 burdensome for a plaintiff’ that actually suffered economic harm”) (quoting *Dura*  
19 *Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Pleading loss causation is an  
20 extremely low bar, and one that the Complaint easily clears. *See In re BofI Holding,*  
21 *Inc. Sec. Litig.*, 977 F.3d 781, 794 (9th Cir. 2020) (at the motion to dismiss stage,  
22 only notice of the loss causation theory needs to be pled); *see also Bricklayers &*  
23 *Masons Loc. Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, 866 F. Supp. 2d  
24 223, 245 (S.D.N.Y. 2012) (“A complaint need only provide the defendant with **some**  
25 **indication** of the loss and the causal connection that the plaintiff has in mind.”)  
26 (internal quotations omitted) (emphasis added). As this Court recognized, Dkt. No.  
27 136 at 2, a plaintiff’s proper pleading of the loss causation element of a Section 14(a)  
28 claim (satisfying the standard in *N.Y.C. Employees’*) is relevant to whether a plaintiff

1 can show a likelihood of success on the merits of its claim. *See Winter v. Nat. Res.*  
2 *Def. Council*, 555 U.S. 7, 20 (2008).

3 **III. PLAINTIFF HAS SHOWN A LIKELIHOOD OF SUCCESS WITH**  
4 **RESPECT TO LOSS CAUSATION**

5 **A. Masimo Has Already Incurred Substantial Expenditures Working**  
6 **to Correct Defendants' Misstatements and Omissions**

7 While Masimo expects that it will experience substantial economic loss if  
8 Defendants are able to take control of the Company without correcting their  
9 misstatements, Masimo has, in fact, *already* suffered economic losses as a result of  
10 Politan's lies. *See* AC ¶ 268. Masimo has expended millions of dollars working to  
11 correct the materially false and misleading Politan Proxy Materials, including by  
12 hiring bankers, public relations consultants, proxy solicitors, outside counsel, and  
13 other specialists to advise on how to ensure that investors know the truth about  
14 Politan's statements before the September 19, 2024 stockholder vote. *Id.* ¶ 271. In  
15 particular, Masimo has engaged nine independent advisors,<sup>1</sup> incurring  
16 approximately \$17,000,000 in fees to date as a result of Defendants' falsehoods  
17 (Young Decl. ISO Suppl. Submission ¶ 15). These are not costs that would have  
18 been incurred in *any* proxy contest: Masimo incurred substantial costs devoted solely  
19 to the correction of Defendants' misstatements.<sup>2</sup>

20 In *N.Y.C. Employees'*, the shareholder plaintiff alleged a single theory of loss  
21 causation—dilution of shareholder interests—which the Ninth Circuit explained is  
22 “unsupported in caselaw.” *N.Y.C. Emps.' Ret. Sys.*, 593 F.3d at 1023–24. Without  
23 any legally sound theory of loss causation, the plaintiff failed to adequately plead

24 <sup>1</sup> Advisors include: (i) Alpha Lavin Advisors, (ii) Greg Schultz, Senior Advisor to  
25 LSN Partners, LLC; (iii) Joele Frank; (iv) Latham & Watkins LLP; (v) Richards,  
26 Layton & Finger, PA; (vi) Marathon Strategies; (vii) Morgan Stanley; (viii) Paul  
Hastings LLP; (ix) Teneo.

27 <sup>2</sup> Masimo filed numerous responses to Defendants' false and misleading statements:  
28 (1) eight press releases; (2) two letters to shareholders; and (3) one presentation filed  
June 26. These burdensome costs should be shouldered by Politan because it has a  
duty to issue truthful statements to prevent an uninformed vote. *See Allergan, Inc.*  
*v. Valeant Pharms. Int'l, Inc.*, 2014 WL 5604539, at \*15 (C.D. Cal. Nov. 4, 2014).

1 economic loss. *Id.* at 1024. But nothing in *N.Y.C. Employees*’ (or the PSLRA) says  
2 that a plaintiff *must* seek monetary damages to obtain injunctive relief. On the  
3 contrary, “courts have recognized other showings of loss causation.” *Id.* (citation  
4 omitted). As to other such showings, *Enzo Biochem, Inc. v. Harbert Discovery*  
5 *Fund, Ltd.*, 2021 WL 4443258 (S.D.N.Y. Sept. 27, 2021), is instructive.<sup>3</sup> There,  
6 issuer Enzo Biochem, Inc. (“Enzo”) brought a Section 14(a) claim against Harbert  
7 Discovery, a fund that launched a proxy contest to “take control of Enzo and force a  
8 fire sale.” *Id.* at \*9. As in this case, Enzo alleged a series of false and misleading  
9 statements in Harbert’s proxy solicitations. *Id.* The court rejected Harbert’s  
10 arguments that Enzo had failed to plead loss causation under Section 14(a):

11 [T]he Complaint plausibly alleges that Enzo was forced to  
12 expend unnecessary Company resources in waging a proxy  
13 contest against Harbert. . . . In particular, the Complaint alleges  
14 that the proxy contest was illegitimate due to the material  
15 misrepresentations of Harbert and that, therefore, Enzo’s  
16 ***expenditure of company resources*** in waging the proxy contest  
17 constitute legal damages compensable under Section 14(a). . . .  
18 These allegations are sufficient to ground a theory of loss  
causation under Section 14(a) because they plead “some  
indication of the loss and the causal connection that the plaintiff  
has in mind.”

19 *Id.* (emphasis added). So too here has Masimo, at every turn, been forced to expend  
20 valuable “company resources.” *Id.* Defendants’ material misstatements and  
21 omissions not only necessitated approximately \$17,000,000 in fees for the above-  
22 named advisors, but also convinced Glass Lewis and ISS to endorse Politan’s  
23 candidates, with reports that parroted Defendants’ lies as facts. AC ¶¶ 1, 262. Even  
24 under the “heightened pleading standards set forth in the PSLRA and Rule 9(b),”  
25 Masimo’s “expenditure of company resources in waging the proxy contest” based  
26 on “material misrepresentations” in the Politan Proxy Statements “constitute legal  
27 damages compensable under Section 14(a).” *Enzo*, 2021 WL 4443258 at \*9.

28 <sup>3</sup> *Enzo* similarly involved Michael Swartz and Randall Adams of shareholder activist  
firm Schulte Roth & Zabel LLP, who defended activist investor Harbert Discovery.

Defendants’ attempt to minimize the import of *Enzo* is unavailing. First, that other courts have not yet had occasion to consider *Enzo* (Dkt. No. 140 at 31) is irrelevant. Defendants complain that other courts in the Second Circuit have not yet “followed” the *Enzo* court’s ruling, *id.*, but do not cite any case (and Plaintiff is not aware of any) in the Second or Ninth Circuits or otherwise where a court *rejected* the holding in *Enzo*. It remains good authority. Second, *Rubenstein v. Adamany*, 2022 WL 6592503, at \*6 n.8 (S.D.N.Y. Oct. 5, 2022) did not, as Defendants urge, narrow the holding in *Enzo*. Dkt. No. 140 at 31. *Rubenstein* only underscores why loss causation is established here: the court distinguished between a proxy contest, on the one hand, and an ordinary course uncontested annual election of directors, on the other, where the plaintiff would not have recovered additional “out-of-pocket expenses” sufficient to show damages. 2022 WL 6592503, at \*6 n.8. The Complaint is clear that here, like *Enzo*, Masimo is engaged in a high-stakes proxy contest where advisors have been hired to go well beyond what would be required in an uncontested director election cycle—including issuing public rebukes and ultimately filing litigation to enforce Plaintiff’s rights and correct Politan’s lies. *See supra* n.2.

Defendants’ reliance on *Hubner v. Mayer*, 2015 WL 12513581 (C.D. Cal. June 8, 2015), likewise does not change the outcome: there, the plaintiffs did not even attempt to plead loss causation; they simply argued that *N.Y.C. Employees’* should not actually require it—an argument the court rejected. *Hubner*, at \*6, 8.

Here, Plaintiff has easily pled out-of-pocket losses directly tied to Defendants’ misstatements. No additional allegation is required. And Plaintiff has demonstrated likelihood of success on the merits by providing evidence of these losses.

**B. Defendants’ Lies Will Continue to Harm Masimo If Uncorrected**

Plaintiff can also plead loss causation by showing that directors elected through misinformation have caused harm to the Company. *See In re Wells Fargo & Co. S’holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1105 (N.D. Cal. 2017) (finding loss causation adequately alleged in a derivative action when “shareholders

suffered a loss as a result of their vote to re-elect Board members based on false or misleading information in the Proxy Statements”); *see also Emps. Ret. Sys. of City of St. Louis v. Jones*, 2021 WL 1890490, at \*15 (S.D. Ohio May 11, 2021) (finding re-election of director defendants “based on false and misleading proxy statements” was sufficient in a derivative action to allege loss causation because it “enabled them to continue an illicit sales scheme”). This is precisely the crux of Masimo’s Complaint: Koffey and others at Politan have intentionally spread misinformation about Masimo and its founder, Joe Kiani, in order to take control of the Company. *See, e.g.*, AC ¶¶ 153–257. While that harm may not have fully come to fruition *yet*, this is the very nature of seeking injunctive relief: to *prevent* an imminent harm from taking place. And, as amply described in the Complaint, this harm has already started to materialize and will only get worse.<sup>4</sup>

If Politan’s omissions regarding this activity are not corrected before the vote, the stockholders might unknowingly elect someone who has already caused, and will continue to cause, damage to Masimo—just like the loss causation adequately alleged in *Wells Fargo*, 282 F. Supp. 3d at 1105. As a matter of policy, that should be enough: the whole point of injunctive relief is to *prevent* an imminent harm from happening before it cannot be undone. It would make little sense to require a plaintiff to prove the entirety of their losses before injunctive relief can issue.

#### IV. CONCLUSION

Plaintiff respectfully requests that the Court find that Plaintiff has shown a likelihood of success on the element of loss causation for its Section 14(a) claim.<sup>5</sup>

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<sup>4</sup> *See, e.g.*, AC ¶¶ 118–120 (Politan timed press release to keep Masimo’s stock price low); *id.* ¶¶ 122–126 (Koffey jeopardized joint venture); *id.* ¶¶ 2–3, 16–17, 23, 63, 81, 91–100 (Koffey dug up dirt on Masimo with former employees); *id.* ¶ 264 (280 highly skilled Masimo engineers threatened to leave “if Joe Kiani is replaced by Quentin Koffey and Politan Capital”); *see also* Exs. 64, 72, 77.

<sup>5</sup> To the extent the Court finds Plaintiff’s allegations insufficient or believes that Plaintiff must specifically request monetary damages based on the allegations described herein (and to the extent not already captured by AC Section XV ¶ h), Plaintiff respectfully requests leave to amend its complaint to cure any deficiencies.



1 Dated: September 4, 2024

Respectfully submitted,

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3  
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